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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Yuba)

THE PEOPLE, Plaintiff and Respondent, v. SYSOUVANH ANDY PANYANOUVONG, Defendant and Appellant.	C079170 (Super. Ct. No. CRF14-491)

Defendant Sysouvanh Andy Panyanouvong appeals his state prison sentence claiming he was deprived of his right to the effective assistance of counsel as guaranteed by the Sixth Amendment to the United States Constitution. We affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

A detailed recitation of the facts underlying defendant's convictions is unnecessary for the disposition of this appeal. Suffice it to say that, in August 2014, while executing a search warrant at defendant's home, members of the Yuba-Sutter

Narcotics Enforcement Team found at least 99 marijuana plants and a Glock 17 handgun. Defendant had previously been convicted of felony failure to appear, making it illegal for him to own or possess a firearm.

Defendant was charged by criminal complaint with cultivation of marijuana (Health & Saf. Code, § 11358—count 1); misdemeanor possession of more than one ounce of marijuana (Health & Saf. Code, § 11357, subd. (c)—count 2); possession of an assault weapon (Pen. Code, § 30605, subd. (a)—count 3);[1] possession of a firearm by a felon (§ 29800, subd. (a)—count 4); and illegal possession of ammunition. (§ 30305, subd. (a)(1)—count 5). The complaint also alleged defendant was ineligible for imprisonment in county jail pursuant to section 1170, subdivision (h). The complaint was later amended to allege an additional count for possession of marijuana for sale. (Health & Saf. Code, § 11359—count 6.)

On September 3, 2014, defendant (represented by a public defender) entered a negotiated plea of no contest to counts 1 and 4 in exchange for dismissal of counts two, three, and five, and dismissal of count 6 with a *Harvey*[2] waiver, as well as an asset forfeiture of $4,000 and a stipulated sentence of three years in the event he failed to comply with his *Cruz*[3] waiver. The plea agreement also allowed defendant the opportunity if he complied with the *Cruz* waiver to argue for a grant of probation at the

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[1] Further unspecified statutory references are to the Penal Code.

[2] *People v. Harvey* (1979) 25 Cal.3d 754.

[3] Pursuant to *People v. Cruz* (1988) 44 Cal.3d 1247 (*Cruz*), a defendant, fully advised of his rights under section 1192.5, may "expressly waive those rights, such that if the defendant willfully fails to appear for sentencing the trial court may withdraw its approval of the defendant's plea and impose a sentence in excess of the bargained-for term." (*Cruz, supra,* at p. 1254, fn. 5.) Any such waiver must be "obtained at the time of the trial court's initial acceptance of the plea, and it must be knowing and intelligent." (*Ibid.*)

time of sentencing with the understanding that, pursuant to defendant's presumptive ineligibility due to his prior felony convictions (§ 1203, subd. (e)(4)), probation could not be granted without an unusual case finding by the trial court pursuant to California Rules of Court, rule 4.413,[4] which provides as follows:

"(c) *Facts showing unusual case* The following facts may indicate the existence of an unusual case in which probation may be granted if otherwise appropriate:

"(1) *Facts relating to basis for limitation on probation* A fact or circumstance indicating that the basis for the statutory limitation on probation, although technically present, is not fully applicable to the case, including:

"(A) The fact or circumstance giving rise to the limitation on probation is, in this case, substantially less serious than the circumstances typically present in other cases involving the same probation limitation, and the defendant has no recent record of committing similar crimes or crimes of violence; and

"(B) The current offense is less serious than a prior felony conviction that is the cause of the limitation on probation, and the defendant has been free from incarceration and serious violation of the law for a substantial time before the current offense.

"(2) *Facts limiting defendant's culpability* A fact or circumstance not amounting to a defense, but reducing the defendant's culpability for the offense, including:

"(A) The defendant participated in the crime under circumstances of great provocation, coercion, or duress not amounting to a defense, and the defendant has no recent record of committing crimes of violence;

"(B) The crime was committed because of a mental condition not amounting to a defense, and there is a high likelihood that the defendant would respond favorably to mental health care and treatment that would be required as a condition of probation; and

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[4] Further rule references are to the California Rules of Court.

"(C) The defendant is youthful or aged, and has no significant record of prior criminal offenses." (Rule 4.413(c).)

New counsel substituted in for defendant on January 5, 2015.

On February 19, 2015, at the People's request, the court remanded defendant into custody for failure to abide by his *Cruz* waiver because he was alleged to have committed a new crime while on release pending sentencing.

On March 16, 2015, defendant filed a motion to withdraw his plea alleging ineffective assistance of counsel. The trial court found defendant violated his *Cruz* waiver but continued the hearing on the plea withdrawal motion.

On April 13, 2015, the court denied defendant's motion to withdraw his plea. On the same day, the court found no facts to indicate the existence of an unusual case under rule 4.413(c) and denied probation. The court noted that, although defendant violated the terms of his *Cruz* waiver, defendant would be "allowed to take the benefit of it as his negotiated plea" and sentenced him to three years in state prison as stipulated. The court imposed fees and fines and awarded defendant 141 days of presentence custody credit (71 actual days plus 70 days of conduct credit).

On April 24, 2015, defendant filed a pro per Proposition 47 petition for resentencing and reduction of certain counts charged in the current case to misdemeanors pursuant to section 1170.18, subdivisions (a) and (f). In particular, the petition sought reduction of section "30805,"[5] a code section that does not exist; sections "29800(a)(1)" and "30305(a)(1)," charges which are not eligible for reduction; and section "11357(c)," a count to which defendant did not plead and, in any event, a count which was already charged as a misdemeanor.

On May 4, 2015, defendant filed a timely notice of appeal.

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[5] Assuming defendant intended to reference section 30605, that too is a count to which he did not plead and, in any event, is not a charge which is eligible for reduction.

On May 28, 2015, the trial court issued an order denying defendant's petition for resentencing and reduction on the ground that the court was divested of subject matter jurisdiction during the pendency of defendant's appeal.

DISCUSSION

Defendant contends he received ineffective assistance of counsel at sentencing when, in seeking a grant of probation or a mitigated sentence, his attorney failed to present evidence that the probation report might not contain a fair assessment of his criminal history, and failed to file petitions pursuant to Proposition 47 (§ 1170.18) to reduce one or more of his prior convictions to misdemeanors. The claims lack merit.

To establish ineffective assistance of counsel, a defendant must show (1) counsel's performance was below an objective standard of reasonableness under prevailing professional norms, and (2) the deficient performance prejudiced defendant. (*Strickland v. Washington* (1984) 466 U.S. 668, 688, 691-692 [80 L.Ed.2d 674, 693-694, 696] (*Strickland*); *People v. Ledesma* (1987) 43 Cal.3d 171, 216-217 (*Ledesma*).) To establish prejudice, defendant must show a reasonable probability that he would have received a more favorable result had counsel's performance not been deficient. (*Strickland, supra,* at pp. 693-694; *Ledesma, supra,* at pp. 217-218.) "A reasonable probability is a probability sufficient to undermine confidence in the outcome." (*Strickland, supra,* at p. 694; accord, *Ledesma, supra,* at p. 218.) Defendant bears the burden of proving a claim of ineffective assistance of counsel. (*People v. Camden* (1976) 16 Cal.3d 808, 816.) "If the defendant makes an insufficient showing of either one of these components, the ineffective assistance claim fails." (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1126.) An appellate court " ' "need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies." ' " (*Ibid.*)

Here, defendant is unable to show any prejudice caused by his counsel's performance. Defendant entered a plea that included presentencing release subject to a

Cruz waiver and a stipulated three-year state prison term in the event he failed to comply with the terms of the waiver. His plea bargain also included an acknowledgement that probation would not be granted without a finding of unusual circumstances pursuant to rule 4.413(c).

Defendant admitted he violated the terms of his *Cruz* waiver by attempting to cash a fraudulent check in the amount of $850. Pursuant to the terms of the plea bargain, that violation triggered imposition of a stipulated three-year prison sentence. Noting the *Cruz* violation and defendant's probation limitation under section 1203, subdivision (e)(4), the court told defense counsel, "[U]nless you can convince me, I can't make an unusual case finding under the requirements of [rule] 4.413(a), (b) and (c) all together, but I'm willing to listen." Counsel argued vigorously on defendant's behalf, focusing on defendant's family support, his age (34 at the time of the hearing), and his need to continue employment to support his family, and talking at length about defendant's drug addiction, his "desperate[]" desire for help, and his willingness to comply with any court order.

The court noted defendant's drug problem was "severe," but questioned whether he was sincere in his desire for a residential drug treatment program given his previous failure with Proposition 36 treatment, and expressed concern that defendant claimed to be allergic to marijuana yet continued to grow the drug and apparently profit from it. The court denied probation, concluding defendant's case was not unusual within the meaning of rule 4.413(c).

When imposing sentence, the court found the circumstances in aggravation—defendant's "numerous" prior convictions as an adult and his prior prison term—"seriously outweigh[ed]" the circumstances in mitigation—defendant's acknowledgment of wrongdoing early in the process and his satisfactory prior performance on probation. The court sentenced defendant to the stipulated term of three years in state prison noting that, despite defendant's violation of the terms of his *Cruz* waiver, defendant would be

"allowed to take the benefit of it as his negotiated plea rather than have the *Cruz* waiver conditions imposed—sanctions imposed where he could get the top of everything."

Defendant claims the trial court was never presented with evidence that his criminal history was "appreciably less serious" than it appeared in the probation report. In that regard, he speculates that his prior 2005 and 2006 convictions could have been reduced to misdemeanors pursuant to section Proposition 47 (§ 1170.18). In particular, he speculates that, although the probation report does not contain specific information about the 2006 Health and Safety Code section 11377, subdivision (a) offense, it is "overwhelmingly likely" the offense could be reduced. As for the 2006 section 459 offense, he speculates it is unlikely the stolen property was worth more than $950. Regarding the 2005 convictions for violation of section 496d and Vehicle Code section 10851, subdivision (a), he speculates the crimes are based on receipt of the same stolen car and, depending on the value of that car, the two offenses may have been reducible to misdemeanors. Alternatively, he argues it "would appear" the two offenses arose from the same criminal act and should therefore be regarded as a single felony offense. Defendant claims there was no tactical reason for not filing petitions to reduce or to point out to the court that the prior convictions might no longer be felonies.

As a preliminary matter, defendant's claims are based on layer upon layer of speculation regarding whether a Proposition 47 petition filed as to one or more of his prior felonies could have been filed, whether those petitions would have been granted, and whether the reduction of one or more of his prior felonies would have been the deciding factor in the trial court's decision to grant or deny probation. Appellate courts do not make decisions based on speculation; they require error shown on the record. (*In re Marriage of Falcone & Fyke* (2008) 164 Cal.App.4th 814, 822.)

In any event, even assuming defendant's prior convictions had been reduced, defendant would still have had a "significant record of prior criminal offenses" (rule 4.413(c)(2)(C)), regardless of whether those offenses were felonies or misdemeanors.

Specifically, defendant's prior criminal history began in 1994, when he was a juvenile, and continued into adulthood, the most recent prior crime having been committed on November 17, 2009. The characterization of defendant's priors as misdemeanors rather than felonies is a distinction without a difference, given that the underlying conduct, which remains the same, still demonstrates extensive criminality and would thus likely still have precluded an unusual case finding under rule 4.413(c)(1)(B).[6] As such, defendant cannot show prejudice.

We note that here is nothing in the record to suggest the trial court failed to consider the relative gravity of each of the offenses in defendant's criminal history. A trial court is deemed to have considered all relevant criteria in deciding whether to grant probation or in making any other discretionary sentencing choice, unless the record affirmatively shows otherwise. (Rule 4.409; *People v. Weaver* (2007) 149 Cal.App.4th 1301, 1313.) The record confirms that here. In any event, in denying probation, the trial court focused not on defendant's criminal history but rather on defendant's "severe" drug problem, his lack of sincerity regarding residential drug treatment in light of his previous failure at Proposition 36 treatment, and his continued efforts to grow and sell marijuana. Only then did the court mention defendant's prior convictions and prior prison term when weighing the aggravating and mitigating circumstances under rules 4.421 and 4.423 for purposes of sentencing.

Defendant has not demonstrated prejudice and therefore his claim of ineffective assistance of counsel fails.

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6 Rule 4.413(c) "is permissive, not mandatory." (*People v. Serrato* (1988) 201 Cal.App.3d 761, 763.) Thus, even if some or all of the criteria in rule 4.413(c) exist, the trial court may, but is not required to, find the case to be an unusual one. (*People v. Stuart* (2007) 156 Cal.App.4th 165, 178.)

DISPOSITION

The judgment is affirmed.

NICHOLSON, Acting P. J.

We concur:

HULL, J.

DUARTE, J.